

1 KEKER, VAN NEST & PETERS LLP  
MATTHEW M. WERDEGAR - # 200470  
2 mwerdegar@keker.com  
KHARI J. TILLERY - # 215669  
3 ktillery@keker.com  
633 Battery Street  
4 San Francisco, CA 94111-1809  
Telephone: 415 391 5400  
5 Facsimile: 415 397 7188

6 BALLARD SPAHR LLP  
DAVID J. BODNEY (pro hac vice to be filed)  
7 bodneyd@ballardspahr.com  
MARK S. KOKANOVICH (SBN 230286)  
8 kokanovichm@ballardspahr.com  
1 East Washington Street, Suite 2300  
9 Phoenix, AZ 85004-2555  
Telephone: 602.798.5454  
10 Facsimile: 602.798.5595

11 SCOTT S. HUMPHREYS (SBN 298021)  
humphreyss@ballardspahr.com  
12 2029 Century Park East, Suite 800  
Los Angeles, CA 90067-2909  
13 Telephone: 424.204.4400  
Facsimile: 424.204.4350

14 Attorneys for Defendant  
15 PAYPAL, INC.

16 UNITED STATES DISTRICT COURT  
17 NORTHERN DISTRICT OF CALIFORNIA  
18 SAN JOSE DIVISION

19 FREE SPEECH SYSTEMS, LLC, a Texas  
20 limited liability company,

21 Plaintiff,

22 v.

23 PAYPAL, INC., a Delaware corporation,

24 Defendant.

Case No. 5:18-cv-06013 LHK (SVK)

**PAYPAL'S OPPOSITION TO  
PLAINTIFF'S EMERGENCY MOTION  
FOR A TEMPORARY RESTRAINING  
ORDER AND PRELIMINARY  
INJUNCTION**

Judge: Hon. Lucy H. Koh

Action Filed: October 1, 2018

Trial Date: None

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Defendant PayPal, Inc. (“PayPal”) opposes Plaintiff Free Speech Systems, LLC’s (“FSS”) First and Second Emergency Motions for a Temporary Restraining Order and Preliminary Injunction.

## **I. INTRODUCTION**

FSS’s “emergency motion”—which seeks to force PayPal to continue to provide payment processing services to FSS’s online store, despite PayPal’s undisputed contractual right to terminate those services—fails to satisfy any of the requirements for a temporary restraining order or preliminary injunction and should be denied.

*First and foremost*, FSS has not established, and cannot establish, any likelihood of immediate and irreparable harm. According to FSS, PayPal is simply one “popular method by which consumers purchase goods” from FSS. TRO Br. at 30. It is not the *only* method; FSS concedes that there are others. Indeed, PayPal is just one of many commercial payment processing services in the market. FSS offers no evidence that it cannot secure payment processing services from an alternative provider, or that it has even attempted do so in the days since it was notified of PayPal’s decision to terminate the parties’ business relationship. Furthermore, even if FSS were to lose some sales while it transitions to a different payment processing service, any such harm can be compensated with money damages; it is not irreparable and does not warrant the extraordinary remedy of a temporary restraining order. FSS offers only conclusory assertions to the contrary.

*Second*, FSS also fails to establish a likelihood of success on the merits of any of its claims. FSS attempts to invoke California’s Unruh Civil Rights Act, Cal. Civ. Code § 51 (the “Unruh Act”), which prohibits discrimination based on an individual’s membership in a particular group. But even if peddlers of inflammatory, tabloid-style news and conspiracy theories could otherwise qualify as a protected group under the Act, the Unruh Act protects *individuals* from discrimination. It does not apply to commercial enterprises such as FSS, and it has never been applied under circumstances remotely similar to those before this Court. And, even if the act did apply, FSS has not established that it is a member of a protected group under the Unruh Act. FSS merely asserts that it is “politically conservative and sells to a conservative audience.” TRO Br.

1 at 12. Being a politically conservative (or liberal) *commercial entity* is not akin to individual  
 2 membership in a protected group. If it were, any for-profit business could claim protection under  
 3 the Unruh Act.

4 FSS' unfair competition law ("UCL") claim also badly misses the mark. FSS contends  
 5 that PayPal's express prohibition on activities related to the "promotion of hate, violence, racial  
 6 or other forms of intolerance" is unconscionable and therefore violative of the UCL. *See* TRO  
 7 Br., Ex. 8. The premise of FSS' argument is contrary the fundamental purpose of the UCL,  
 8 which is to promote fairness in commercial markets. *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 949  
 9 (2002), *as modified* (May 22, 2002). Moreover, FSS' UCL claim is based on the false premise  
 10 the "News Sites" (inforwars.com and prisonplanet.com) and the "Store Site"  
 11 (infowarssstore.com) are essentially unrelated, and that it is unconscionable for PayPal to  
 12 terminate its relationship with the Store Site based on the "off-platform" activities of the News  
 13 Sites. TRO Br. at 15. But one need only go to the home pages of the News Sites and the Store  
 14 Site to see that they are one-in-the-same. The News Sites promote the Store Site and its products,  
 15 and the revenue from the Store Site directly funds the activities of the News Sites. The News  
 16 Sites also directly solicit donations and subscription fees, also processed by PayPal. Simply put,  
 17 PayPal has the contractual right to terminate its relationship with any user for any reason,  
 18 including but not limited to, violations of PayPal's Acceptable Use Policy.

19 FSS' breach of the implied covenant of good faith and fair dealing claim is equally  
 20 without merit. PayPal's User Agreement with FSS grants PayPal the discretion to terminate its  
 21 services at any time, for any reason, upon notice. ("PayPal, in its sole discretion, reserves the  
 22 right to suspend or terminate this user agreement").<sup>1</sup> FSS does not contend otherwise. And "[a]s  
 23 to acts and conduct authorized by the express provisions of the contract, no covenant of good  
 24 faith and fair dealing can be implied which forbids such acts and conduct." *Carma Developers*  
 25 *(Cal.), Inc. v. Marathon Dev. California, Inc.*, 2 Cal. 4th 342, 374 (1992). In other words, with

26 <sup>1</sup> *See* Declaration of Khari J. Tillery in Support of PayPal's Opposition to Plaintiff's Emergency  
 27 Motion for a Temporary Restraining Order and Preliminary Injunction. ("Tillery Decl.") Ex. A  
 28 (PayPal User Agreement) at 33-34; [https://www.paypal.com/us/webapps/mpp/ua/useragreement-  
 full](https://www.paypal.com/us/webapps/mpp/ua/useragreement-full).

only a narrow exception not alleged to apply here, “[c]ourts are not at liberty to imply a covenant directly at odds with a contract’s express grant of discretionary power[.]” *Third Story Music, Inc. v. Waits*, 41 Cal. App. 4th 798, 808 (1995) (emphasis added). Because FSS’ request for injunctive relief is contrary to this rule, FSS has not established, and cannot establish, a likelihood of success on the merits.

Finally, the balance of the equities tips strongly in PayPal’s favor, as the relief FSS seeks—forcing PayPal to continue to provide services to a commercial enterprise whose activities are contrary to PayPal’s own core values of diversity and inclusion<sup>2</sup>—would violate PayPal’s exercise of its constitutionally protected right to free speech. *See, e.g., Janus v. Am. Fed’n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2464 (2018). Furthermore, under the doctrine of unclean hands, FSS’ own misconduct—including secretly recording its telephone conversation with PayPal and posting it to the internet without permission to generate publicity—precludes the possibility of the extraordinary equitable relief it seeks. For the same reasons, the public interest would not be served by granting the unprecedented injunctive relief requested by FSS.

For all these reasons, as explained in detail below, FSS motion for a temporary restraining order and preliminary injunction should be denied.

## II. RELEVANT BACKGROUND

FSS is a for-profit Texas limited liability company that operates the websites “Infowars” and “PrisonPlanet,” among other commercial ventures. Infowars and PrisonPlanet offer a mélange of tabloid-style sensationalist and fake news stories targeting, among others, ethnic and religious minorities and members of the LGBTQ community.<sup>3</sup> The websites also advertise a variety of nutritional supplements and other products that are sold through FSS’ online store.<sup>4</sup>

<sup>2</sup> <https://www.paypal.com/stories/us/our-commitment-to-diversity-and-inclusion-at-paypal>

<sup>3</sup> Infowars is perhaps most notorious for spreading false reports that the mass shooting of children at Sandy Hook Elementary School in Newtown, Connecticut was an elaborate government hoax involving actors, rather than actual victims. *See, e.g.,* <https://www.nbcnews.com/tech/tech-news/after-years-crisis-actor-smears-sandy-hook-conspiracy-targets-ask-n892926>.

<sup>4</sup> *See* <https://www.infowars.com/>; <https://www.prisonplanet.com/>; <https://www.infowarsstore.com/>.



1 All of these websites are interrelated. The News Sites (Infowars and PrisonPlanet) include  
 2 prominent links to the Store Site and advertisements for products sold on the Store Site. Tillery  
 3 Decl., Exs. B and C (screen shots News Sites home pages). Conversely, the Store Site  
 4 (InfowarsStore) touts the fact that its profits are being used to support the activities of the News  
 5 Sites. *Id.*, Ex. D (screen shot of the Store Site homepage) (“We’re proud of our fellow patriots  
 6 and Infowarriors for taking part and helping to support us in the fight for truth. ... Your gracious  
 7 support for our crew in the fight for liberty goes directly towards independent alternative news  
 8 media, and we owe all of our success and effectiveness to you.”).

9 According to FSS, since approximately 2007, FSS has contracted with PayPal to provide  
 10 FSS’ payment processing services to its subsidiary websites. Declaration of Alex Jones (“Jones  
 11 Decl.”) ¶ 10.<sup>5</sup> According to FSS, “PayPal is a popular method by which customers purchase  
 12 goods on the Store Site.” TRO Br. at 20. PayPal’s User Agreement governs the parties’  
 13 commercial relationship and provides that PayPal may suspend or terminate access to or use of  
 14 its websites, software, systems, or services for any reason and at any time upon notice to the FSS:

15 PayPal, *in its sole discretion*, reserves the right to suspend or terminate this user  
 16 agreement, access to or use of its websites, software, systems (including any networks and  
 17 servers used to provide any of the PayPal services) operated by us or on our behalf or  
 18 some or all of the PayPal services for any reason and at any time upon notice to you and,  
 upon termination of this user agreement, the payment to you of any unrestricted funds  
 held in your PayPal balance.<sup>6</sup> (Emphasis added)

19 Tillery Decl., Ex. A at 33-34 (emphasis added)

20 On September 20, 2018, PayPal provided telephonic notice to FSS pursuant to the User  
 21 Agreement that it was terminating FSS’ accounts. Tillery Decl., Ex. E (Declaration of Heidi  
 22 Machock (“Machock Decl.”)) ¶¶ 4-8. Although it was not required to provide FSS with any  
 23 grace period, PayPal informed FSS that it was giving the company ten business days to transition  
 24 to other payment processors, of which there are many. *Id.* ¶ 7; Tillery Decl., Ex. F (Declaration  
 25 of Lisa Hrabosky (“Hrabosky Decl.”)) ¶¶ 3-6. PayPal also offered to help FSS transition to a

26  
 27 <sup>5</sup> Specifically, FSS asserts that PayPal has provided services to the “Store Site” since 2000, and  
 that FSS “assumed ownership and operation of the Store Site and PayPal accounts” in 2007. *Id.*

28 <sup>6</sup> See <https://www.paypal.com/us/webapps/mpp/ua/useragreement-full>.

1 new vendor. Machock Decl. ¶ 8.

2 PayPal did not make its decision public, and did not intend to. Tillery Decl., Ex. G  
3 (Declaration of Justin Higgs (“Higgs Decl.”)) ¶ 4. FSS, however, immediately publicized  
4 PayPal’s decision on its Infowars website, posting on September 21, 2018 an article entitled:  
5 “Bombshell: PayPal Bans Infowars After Lobbying By Soros-Funded Group.”<sup>7</sup> *Id.* ¶ 5. PayPal  
6 has since learned that FSS surreptitiously recorded its telephone conversation with PayPal’s  
7 representatives in violation of California law, which it subsequently posted to its Infowars  
8 website. Machock Decl. ¶¶ 6, 11.<sup>8</sup>

9 Ten days after PayPal had provided notice, FSS filed the present lawsuit and its  
10 “emergency” motion for a temporary restraining order. FSS does not claim to have made any  
11 efforts prior to filing suit to secure an alternative payment processing vendor.

### 12 **III. LEGAL STANDARD**

13 A temporary restraining order is a matter of equitable discretion and is “an extraordinary  
14 remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such  
15 relief.” *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). The analyses  
16 for granting a temporary restraining order and a preliminary injunction are “substantially  
17 identical.” *Stuhlbarg Int’l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir.  
18 2001).

19 A plaintiff seeking preliminary injunctive relief must establish “[1] that he is likely to  
20 succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary  
21 relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public  
22 interest.” *Winter*, 555 U.S. at 20. Alternatively, an injunction may issue where “the likelihood of  
23 success is such that serious questions going to the merits were raised and the balance of hardships  
24 tips sharply in plaintiff’s favor,” provided that the plaintiff can also demonstrate the other *Winter*  
25 factors. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011)

26 <sup>7</sup> See [https://www.infowars.com/bombshell-paypal-bans-infowars-after-lobbying-by-soros-  
funded-group/](https://www.infowars.com/bombshell-paypal-bans-infowars-after-lobbying-by-soros-funded-group/).

27 <sup>8</sup> See [https://www.infowars.com/shock-audio-listen-to-the-phone-call-where-paypal-banned-  
infowars/](https://www.infowars.com/shock-audio-listen-to-the-phone-call-where-paypal-banned-infowars/).

(citation and internal quotation marks omitted). Under either standard, the plaintiff bears the burden of making a clear showing on these elements and on entitlement to this extraordinary remedy. *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010).

#### IV. ARGUMENT

##### A. FSS has not established, and cannot establish, that it is likely to suffer irreparable harm.

A party seeking injunctive relief must offer evidence of likely irreparable harm, and may not rely on “unsupported and conclusory statements regarding harm [the plaintiff] *might* suffer.” *Pom Wonderful LLC v. Pur Beverages LLC*, No. CV1306917MMMCWX, 2015 WL 10433693, at \*5 (C.D. Cal. Aug. 6, 2015) (quoting *Herb Reed Enterprises, LLC v. Fla. Entm't Mgmt., Inc.*, 736 F.3d 1239, 1250 (9th Cir. 2013)) (emphasis in original). In this case, the only evidence that FSS points to in support of its irreparable harm claims are a few conclusory statements in the declaration of Alex Jones. *See* TRO Br. at 20.

Mr. Jones states that “[a] significant portion [but not all] of purchases from the Store Site occur using the PayPal service.” And he baldly asserts that “[t]here is no adequate payment alternative to PayPal for Plaintiff’s business model,” and that “the loss of PayPal would lead to the loss of revenue in an amount Plaintiff cannot calculate because users will no longer purchase goods on the Store Site.” Jones Decl. ¶¶ 19-20. Notably, Mr. Jones does not explain why FSS cannot rely on other existing payment methods. And he does not offer any facts concerning any efforts whatsoever by FSS to find an alternative payment processor since it received notice of termination from PayPal on September 20.

Mr. Jones’ statements are precisely the kind of conclusory assertions that the Ninth Circuit repeatedly has rejected as insufficient to establish irreparable harm. *See, e.g., Herb Reed Enterprises, LLC v. Fla. Entm't Mgmt., Inc.*, 736 F.3d 1239, 1250 (9th Cir. 2013) (holding that pronouncements “grounded in platitudes rather than evidence” are insufficient); *Caribbean Marine Servs. Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (holding that “[s]peculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction” and adding that a “plaintiff must *demonstrate* immediate threatened

injury as a prerequisite to preliminary injunctive relief” (emphasis in original)). Indeed, Mr. Jones’ statements are worse than conclusory—they are counterfactual in key respects. Specifically, Mr. Jones’ unsupported assertion that there is no adequate payment processing alternative to PayPal is contrary to fact as there are numerous other payment processing providers that FSS could utilize instead of PayPal to handle payments for FSS’ online store.<sup>9</sup> See Hrabosky Decl. ¶¶ 3-6.

Additionally, even if FSS had evidence to back up its claims of imminent loss of sales, “[l]oss of sales alone will not support a finding of irreparable injury ‘because acceptance of that position would require a finding of irreparable harm to every plaintiff regardless of circumstances.’” *Aurora World, Inc. v. Ty Inc.*, 719 F. Supp. 2d 1115, 1169 (C.D. Cal. 2009) (quoting *Reebok Intern. Ltd. v. J. Baker, Inc.*, 32 F.3d 1552, 1557 (Fed. Cir. 1994)). Calculating lost sales—based on historical sales records or other evidence—is a common exercise for damages expert witnesses in litigation. And FSS offers no support for its assertion that its lost sales will be impossible to calculate or that he attempted to mitigate any alleged harm by transitions to a new payment processor.

FSS’ cursory loss of goodwill argument fares no better. The only evidence it cites are a few news articles reporting on PayPal’s decision to stop doing business with FSS. See TRO Br. at 21. But that publicity was self-inflicted. PayPal did not publicize its decision to terminate FSS’ accounts, and it did not intend to. Higgs Decl. ¶ 4. Rather, FSS affirmatively chose to publicize PayPal’s decision, calling it a “ban” prompted by lobbying by a “Soros-funded group.” *Id.* ¶ 5. Furthermore, that such publicity will actually harm FSS’ business—which is based on generating controversy—is pure speculation. Notably, FSS has not offered any evidence of a loss of sales or other business impact since it disclosed PayPal’s decision. And “a finding of reputational harm may not be based on ‘pronouncements [that] are grounded in platitudes rather than evidence.’” *Titaness Light Shop, LLC v. Sunlight Supply, Inc.*, 585 Fed. Appx. 390, 391 (9th Cir. 2014) (quoting *Herb Reed*, 736 F.3d at 1250) (brackets in original); see also *Pom Wonderful*,

<sup>9</sup> FSS itself alleges that PayPal only has a 40% market share. See TRO Br. at 17.

2015 WL 10433693, at \*5.

In short, FSS has failed to establish a likelihood of irreparable harm, and the Court should deny FSS’ motion on that basis alone. *See, e.g., Realtek Semiconductor, Corp. v. LSI Corp.*, No. C-12-3451-RMW, 2014 WL 2738226, at \*4 (N.D. Cal. June 16, 2014) (“[i]rreparable harm is an essential prerequisite for a grant of injunctive relief[.]”); *A&A Int’l Apparel, Inc. v. Xu*, No. CV 15-644-GW(AGRX), 2015 WL 12850544, at \*3 (C.D. Cal. Jan. 29, 2015) (“the moving party must first demonstrate that such injury is likely before other requirements for the issuance of an injunction will be considered.” (internal quotations omitted)).

**B. FSS has not established, and cannot establish, a likelihood of prevailing on the merits of any of its claims.**

FSS’ complaint against PayPal includes three causes of action: a claim under the Unruh Act, a claim under California Business and Professions Code § 17200, and a claim for breach of the implied covenant of good faith and fair dealing. FSS’ motion for injunctive relief fails to establish a likelihood of success on the merits as to any of these claims.

**1. The Unruh Act does not apply to FSS or its claims**

Under the Unruh Act, businesses may not “exclude *individuals* who wear long hair or unconventional dress, who are black, who are members of the John Birch Society, or who belong to the American Civil Liberties Union, merely because of these characteristics or associations.” *In re Cox*, 3 Cal. 3d 205, 217-18 (1970) (emphasis added). FSS is not an “individual,” or even an association of likeminded individuals. It is a Texas limited liability company. *See* Compl. ¶ 13. And FSS has not cited, and PayPal has been unable to locate, a single Unruh Act case that did not involve discrimination against an *individual*. The Court should reject FSS novel and entirely unsupported assertion that an Unruh Act claim can survive without any claim of individual discrimination.

The plain language of the Unruh Act describes individual characteristics that can only be held by natural persons. Section 51 provides:

All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or

1 immigration status are entitled to the full and equal accommodations, advantages,  
2 facilities, privileges, or services in all business establishments of every kind whatsoever.

3 Cal. Civ. Code § 51(b). Although courts have added various categories to the list in Section 51  
4 over the years, the California Supreme Court has held that the characteristics listed in Section  
5 51(b) are “illustrative” of the kinds of discrimination prohibited by the Act. *In re Cox*, 3 Cal. 3d  
6 at 212.

7 In *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142 (1991), the California  
8 Supreme Court examined the legislative history of the Unruh Act to determine what other types  
9 of characteristics could be afforded protected-class status under the Act. The court noted that the  
10 Legislature emphasized the importance of Section 51’s enumerated list of characteristics by  
11 repeating it three times. *Id.* at 1160; *see also* Cal. Civ. Code §§ 51(b), 51(c), 52(d). Accordingly,  
12 the California Supreme Court held that “[i]n order to give significance to the Legislature’s  
13 specific and repeated emphasis on these categories, we must ascertain their common element,”  
14 which the court found to be “personal as opposed to economic characteristics.” *Harris*, 52 Cal.  
15 3d at 1160.

16 The characteristics enumerated in Section 51 apply only to natural persons, and not to  
17 companies. A company obviously lacks a sex, race, color, or sexual orientation. In this context,  
18 interpreting the term “person” in Section 51 to include a company would make no sense and  
19 would therefore violate a basic tenet of statutory construction under California law. *See, e.g.,*  
20 *Arnett v. Dal Cielo*, 14 Cal. 4th 4, 22 (1996) (“Courts should give meaning to every word of a  
21 statute if possible, and should avoid a construction making any word surplusage.”) (citing  
22 *Delaney v. Superior Court*, 50 Cal. 3d 785, 798–99 (1990)). Because a corporation that has no  
23 “sex” or “race” it cannot possibly make claims for discrimination on that basis, the Court should  
24 not interpret Section 51(b) as providing such a right.

25 FFS may seek to argue that *Rotary Club of Duarte v. Board of Directors*, 178 Cal. App.  
26 3d 1035 (1986), stands for the proposition that entities, and not just individuals, may bring claims  
27 under the Unruh Act. But *Rotary Club* actually underscores the fact a that company cannot bring  
28 claims for alleged discrimination based on company practices or characteristics. In *Rotary Club*,

1 a local chapter of the Rotary Club decided to admit female members in violation of the male-only  
2 membership rules set by Rotary Club International. *Id.* at 1044–46. Thereafter, the local club’s  
3 charter was revoked by the international organization. *Id.* The local chapter and several female  
4 members brought a claim for declaratory and injunctive relief against Rotary Club International  
5 for sex discrimination against female members. *Id.* The court held that the international  
6 organization’s actions constituted sex discrimination in violation of the Unruh Act. *Id.* at 1059.  
7 The court also found that the local chapter of the Rotary Club could bring a claim in conjunction  
8 with the female members because the action taken against the local chapter was “on account of its  
9 association with women.” *Id.* at 1061 (citing *Winchell v. English*, 62 Cal. App. 3d 125, 129  
10 (1976)).

11 At most, *Rotary Club* stands for the proposition that an association can bring claims for  
12 injunctive and/or declaratory relief under the Unruh Act in response to discrimination against  
13 individual members of the association. Here, FSS is not an association with members. And it  
14 does not purport to bring its claims on behalf of in association with any individual. FSS is  
15 bringing its claims on its own behalf, alleging that it, not any individual, is the victim of  
16 discrimination. *See, e.g.*, TRO Br. at 12 (accusing PayPal of terminating its contract with FSS  
17 “because of the views expressed on the News Sites, and the views of the authors of literature sold  
18 on the Store Site”). Neither the text of the Unruh Act nor any case interpreting the Act supports  
19 such an application of the statute.

20 Furthermore, even if a company, as opposed to an individual or an association of  
21 individuals, could bring an Unruh Act claim, FSS fails to establish that it is a member of a  
22 protected group under the Act. Indeed, FSS does not claim that it is a member of any group  
23 enumerated in the statute or any other specific group—such as the John Birch Society or the  
24 ACLU, mentioned in *In re Cox*—that is subject to discrimination. Rather, FSS merely asserts  
25 that it is “politically conservative and sells to a conservative audience” and that PayPal is  
26 cancelling its accounts for these reasons. TRO Br. at 12. FSS’ amorphous assertions stand in  
27 contrast to those at issue in *McCalden v. California Library Ass’n*, 955 F.2d 1214 (9th Cir. 1990),  
28 cited by FSS. There, a divided panel of the Ninth Circuit held that on a motion to dismiss,



1 plaintiff's allegation that he was discriminated against because he was "a member of a class of  
 2 'Holocaust Revisionists,' who are subject to invidious discrimination because they spread  
 3 unpopular views about the history of the Holocaust" was sufficient state a claim under the Unruh  
 4 Act. *Id.* at 1220-21. But even in *McCalden* the majority made clear that its decision was based  
 5 on the standard for evaluating a motion to dismiss. *Id.* at 1221("On a motion to dismiss, however,  
 6 the court must deem the complaint's allegations to be true."). That standard for evaluating the  
 7 likelihood of success on the merits in the context of a motion for a TRO is much more stringent  
 8 and places the burden of proof squarely on the plaintiff.

9 If vague claims of political affiliation with the right or the left were sufficient to invoke  
 10 the Unruh Act, the Act would effectively be without limits. Indeed, if FSS' sweeping  
 11 interpretation were applied, advertisers could be sued for discrimination by television production  
 12 companies or television stations for pulling their advertising from television shows whose content  
 13 they no longer wish to be affiliated with. Likewise, vendors of commercial services could be  
 14 sued for not providing business services to other companies whose products, branding, or  
 15 marketing are inconsistent with the vendor's own branding or marketing. No court has ever  
 16 endorsed such a boundless interpretation of the statute's provisions.

17 In short, the Unruh Act does not apply to FSS' claims and, therefore, FSS has not  
 18 established and cannot establish a likelihood of success on the merits.

## 19 **2. FSS has not established a likelihood of success on its UCL claim**

20 California's unfair competition law ("UCL") defines "unfair competition" as "any  
 21 unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading  
 22 advertising." Cal. Bus. & Prof. Code § 17200. By defining unfair competition to include "*any*  
 23 *unlawful*" business practice, the UCL "permits violations of other laws to be treated as unfair  
 24 competition that is independently actionable." *Kasky*, 27 Cal. 4th at 949. As the basis for its  
 25 UCL claim here, FSS contends that PayPal's Acceptable Use Policy, incorporated by reference  
 26 into PayPal's User Agreement, violates the Consumer Legal Remedies Act (the "CLRA"), which  
 27 prohibits certain "unfair methods of competition and unfair or deceptive acts or practices,"  
 28 including "[i]nserting an unconscionable provision in the contract." FSS claims that PayPal's



1 Acceptable Use Policy is unconscionable because it “mentions nothing about evaluating a user’s  
 2 *off-platform activities* as a basis for finding that the user has violated the policy.” TRO Br. at 14  
 3 (emphasis added). FSS’ argument is factually misleading and legally incorrect. It also ignores  
 4 that the fact that PayPal has the contractual right, as set forth in its User Agreement, to terminate  
 5 any user account, for any reason, at its discretion. Tillery Decl., Ex. A at 33-34.

6 Unconscionability is a defense to the enforcement of a contract and the party asserting the  
 7 defense—here, FSS—bears the burden of proof. *Sanchez v. Valencia Holding Co., LLC*, 61 Cal.  
 8 4th 899, 911(2015). For FSS to prevail on this defense, it must establish both *procedural* and  
 9 *substantive* unconscionability. Procedural unconscionability “addresses the circumstances of  
 10 contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining  
 11 power.” *Pinnacle Museum Tower Assn. v. Pinnacle Mkt. Dev. (US), LLC*, 55 Cal. 4th 223, 246  
 12 (2012). And substantive unconscionability “pertains to the fairness of an agreement’s actual  
 13 terms and to assessments of whether they are overly harsh or one-sided.” *Id.* California courts  
 14 have intentionally set an extremely high bar for establishing unconscionability. As the California  
 15 Supreme Court reiterated, “[c]ommerce depends on the enforceability, in most instances, of a  
 16 duly executed written contract” and “[a] party cannot avoid a contractual obligation merely by  
 17 complaining that the deal, in retrospect, was unfair or a bad bargain.” *Sanchez*, 61 Cal. 4th at  
 18 911. Rather, to establish unconscionability, the terms of the agreement must be “overly harsh,”  
 19 “unduly oppressive,” “so one-sided as to shock the conscience,” or “unfairly one-sided.” *Sonic-*  
 20 *Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1145, 311 P.3d 184, 202 (2013) (internal  
 21 quotation marks omitted). FSS’ claim does not (and cannot) meet this demanding standard.

22 *First*, FSS offers no basis for a finding of procedural unconscionability in agreeing to the  
 23 terms of PayPal’s Acceptable Use Policy, which is incorporated by reference into the User  
 24 Agreement. FSS is a sophisticated business entity operating multiple for-profit websites with  
 25 millions of visitors. If FSS was concerned with the terms PayPal’s Acceptable Use Policy, it  
 26 could have chosen (and now must choose) a different payment processing option. According to  
 27 FSS, “PayPal is a popular method by which customers purchase goods on the Store Site,” but not  
 28 the only one. TRO Br. at 20. FSS also asserts that PayPal only controls 40% of the online

1 payment market (TRO Br. at 17), leaving plenty of alternatives to choose from. Thus, even  
 2 assuming the truth of FSS' contention that the Store Site "could not exist without being able to  
 3 use online payment processing services" (TRO Br. at 16-17), it is not entitled to use PayPal's  
 4 service in violation of PayPal's User Agreement, including its Acceptable Use Policy.

5 *Second*, FSS also fails to establish a basis for a finding of substantive unconscionability.  
 6 "A contract term is not substantively unconscionable when it merely gives one side a greater  
 7 benefit; rather, the term must be so one-sided as to shock the conscience." *Pinnacle*, 55 Cal. 4th  
 8 at 246 (internal quotations omitted). No reasonable person's conscience would be shocked at  
 9 PayPal's User Agreement, which allows PayPal, "in its sole discretion," to terminate any user  
 10 agreement. Tillery Decl., Ex. A at 33-34. The same is true for PayPal's Acceptable Use Policy,  
 11 which directly prohibits PayPal users from using "the PayPal service for activities that ... *"relate*  
 12 *to transactions* involving ... the promotion of hate, violence, racial or other forms of intolerance  
 13 that is discriminatory." TRO Br., Ex. 8 (emphasis added). FSS does not deny that the content of  
 14 its websites violates this straightforward and reasonable policy designed promote PayPal's core  
 15 values of tolerance, diversity, inclusion, and equity.

16 Rather, FSS' entire argument is based on the false premise that the "Infowar Store"  
 17 website<sup>10</sup> ("Store Site"), which sells a variety of products, is somehow separate and distinct from  
 18 the Infowars and PrisonPlanet websites ("News Sites") that peddle in hate-filled and  
 19 discriminatory rhetoric. This argument ignores PayPal's User Agreement, which gives PayPal  
 20 the contractual right to terminate any user agreement, for any reason, at its discretion. It is also  
 21 wrong as a matter of fact. The News Sites include prominent links to the Store Site and  
 22 advertisements for products sold on the Store Site. *See* Tillery Decl., Exs. B and C (screen shots  
 23 News Sites home pages). Conversely, the Store Site touts the fact that proceeds from product  
 24 sales are being used to support the activities of the News Sites. *Id.*, Ex. D (screen shot of the  
 25 Store Site homepage) ("We're proud of our fellow patriots and Infowarriors for taking part and  
 26 helping to support us in the fight for truth. ... Your gracious support for our crew in the fight for

27  
 28 <sup>10</sup> <https://www.infowarsstore.com/>

liberty goes directly towards independent alternative news media, and we owe all of our success and effectiveness to you.”). Indeed, when addressing its purported harm, FSS highlights the close relationship between the News Sites and the Store Site, arguing that a permanent limitation of Store Site’s PayPal Account would result in a loss of “good will and prospective visitors of the News Sites.” TRO Br. at 8. The News Sites also directly solicit donations and subscription fees, also processed by PayPal.

It appears FSS wants to have it both ways. With respect to the merits of its UCL claim, it alleges that the News Sites and Store Sites are unrelated, framing PayPal’s decision to terminate the Store Site’s account as unconscionably based on alleged “off-platform activities” (*i.e.*, the activities of the News Sites). *See* TRO Br. at 14. But when it comes to its alleged harm, FSS reverses course, stressing the close relationship between the News Sites and Store Sites and claiming that the termination of the Store Site’s account will result in harm to the News Sites. *See* TRO Br. 8. Despite FSS’ conflicting arguments, the record is clear: the activities of News Sites and the sales on Store Site are directly related and violate PayPal’s Acceptable Use Policy. Finally, there is nothing in the PayPal’s User Agreement or Acceptable Use Policy to suggest that PayPal would tolerate the hateful and discriminatory activities of one of its users, so long as it takes place in a different forum.

For these reasons, FSS cannot establish that PayPal acted unconscionably in deciding to exercise its contractual right to terminate its relationship with FSS.

### **3. FSS has not established a likelihood of success on its breach of the implied covenant claim**

There is no question that the express terms of PayPal’s User Agreement, which governs its business relationship with FSS, gives PayPal the right, in its “sole discretion,” to restrict or terminate a user’s account, “for any reason and at any time[.]” Tillery Decl., Ex. A at 33-34. FSS does not argue otherwise. Nor does it argue that this provision renders the parties’ agreement illusory such that it is unenforceable. Rather, FSS argues, without citation, that PayPal has nonetheless violated the implied covenant because it did not fairly exercise its discretionary power to terminate FSS’ accounts. *See* TRO Br. at 19. FSS’ argument misinterprets the law and

1 fails to establish a likelihood of success on the merits.

2 Under California law, Courts may not read an implied covenant into a contract to prohibit  
 3 a party from doing something that is expressly permitted by the agreement. *Carma*, 2 Cal. 4th at  
 4 374. Thus, “courts are not at liberty to imply a covenant directly at odds with a contract’s express  
 5 grant of discretionary power except in those relatively rare instances when reading the provision  
 6 literally would, contrary to the parties’ clear intention, result in an unenforceable, illusory  
 7 agreement.” *Third Story Music*, 41 Cal. App. 4th at 808; *accord Cry Wolf v. Walt Disney*  
 8 *Pictures & Television*, 162 Cal. App. 4th 1107, 1122 (2008) (“[S]o long as the agreement is  
 9 supported by adequate consideration such that the grant of discretion does not render it illusory,  
 10 the court will not recognize or enforce an implied term directly at odds with an express  
 11 contractual grant of unfettered discretion.”).

12 In *Third Story Music*, for example, the parties had an agreement under which Warner  
 13 Communications agreed to manufacture, sell, distribute, and advertise the works of Tom Waits,  
 14 but the agreement also stated that Warner “may at our election refrain from any or all of the  
 15 foregoing.” *Id.* at 801. The plaintiff sued for breach of the implied covenant of good faith and  
 16 fair dealing, claiming that Warner had impeded the plaintiff from receiving the benefits of the  
 17 contract (a percentage of royalties) by allowing lucrative deals to fall apart. The Court of Appeal  
 18 concluded as a matter of law that—because there was consideration for the agreement, and the  
 19 agreement gave Warner discretionary power and expressly allowed Warner to refrain from  
 20 marketing the Waits recordings--Warner had no duty of good faith in exercising its discretion. *Id.*  
 21 at 808–09.

22 Consistent with this established law, California courts consistently have declined to apply  
 23 the implied covenant to express contractual provisions allowing for termination for any reason.  
 24 *See, e.g., PMC, Inc. v. Porthole Yachts, Ltd.*, 65 Cal. App. 4th 882, 890–92 (1998) (rejecting  
 25 application of implied covenant to termination provision allowing for termination for any reason);  
 26 *Gerdlund v. Elec. Dispensers Int’l*, 190 Cal. App. 3d 263, 277 (1987) (error to apply implied  
 27 covenant to express provision allowing notice of termination to be given “at any time and for any  
 28 reason”). The present case is no different. PayPal’s relationship with FSS is a contractual

relationship between two business entities, nothing more. And PayPal has done only what the parties' contract expressly gives it the right to do. Under these circumstances, there can be no breach of the implied covenant. *See Vectren Commc'ns Servs. v. City of Alameda*, No. C 08-3137 SI, 2009 WL 2566722, at \*4–6 (N.D. Cal. Aug. 18, 2009).

\* \* \*

In sum, FSS has failed to establish a likelihood of success on the merits of any of its claims. And “[w]hen . . . a party has not shown any chance of success on the merits, no further determination of irreparable harm or balancing of hardships is necessary.” *Global Horizons, Inc. v. United States Dep’t of Labor*, 510 F.3d 1054, 1058 (9th Cir. 2007). Accordingly, the Court should deny FSS’ motion.

**C. The balance of hardships and the public interest are in PayPal’s favor**

Although the Court need not reach the issue, given FSS’ other failures of proof, the balance of the equities also tips strongly in PayPal’s favor. The relief FSS seeks—forcing PayPal to continue to provide services to a commercial enterprise whose business objective and practices are contrary to PayPal’s business practices—would violate PayPal’s exercise of its constitutionally protected right to free speech. *Cf., Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974) (holding a right of reply statute unconstitutional as coerced speech in violation of the First Amendment).

By its own admission, FSS trades in inflammatory and controversial content. That is its business. FSS fails to cite any authority for the proposition that a private, non-governmental actor such as PayPal may be compelled to provide commercial services to a business whose products and messages are contrary to its own core company values. A purveyor of hate speech and discrimination is not entitled to compel a private, non-governmental service provider to continue to do business with such an entity. To the contrary, such compelled support for private speech raises serious First Amendment concerns. *See Janus*, 138 S. Ct. at 2464 (“Compelling a person to subsidize the speech of other private speakers raises . . . First Amendment concerns.”) “As Jefferson famously put it, ‘to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.’” *Id.* (quoting

1 A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed.  
2 1950)). FSS may have a right to publish what it publishes on the Internet. But no law requires  
3 PayPal to provide its services to help FSS reap a profit or allows FSS to trade on PayPal's good  
4 name and brand. For the same reasons, the public interest would not be served by FSS'  
5 unprecedented requested injunction.

6 Furthermore, FSS' conduct related to this matter constitutes unclean hands, which "closes  
7 the doors of a court of equity to one tainted with inequity or bad faith relative to the matter  
8 in which he seeks relief." *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S.  
9 806, 814 (1945). FSS demonstrated remarkable bad faith (and likely violated California law)  
10 when it surreptitiously recorded, without PayPal's consent, the very telephone conversation in  
11 which PayPal apprised FSS of its termination decision and gave FSS ten business days to  
12 transition to a new service provider. Machock Decl. ¶¶ 6, 11. FSS continued to demonstrate bad  
13 faith by promptly posting the surreptitiously recorded call on its website, again without notice to  
14 or permission from PayPal. Mr. Jones himself, at the conclusion of the posted video including the  
15 surreptitiously recorded call, requests that his listeners "cancel PayPal."<sup>11</sup> Mr. Jones' own  
16 statement on the video belies his belated assertion of irreparable harm in his declaration and  
17 further demonstrates FSS' bad faith.

## 18 **V. CONCLUSION**

19 FSS' motion for a temporary restraining order is long on self-serving rhetoric and almost  
20 completely lacking in factual or legal support. FSS has not established and cannot establish any  
21 genuine risk of irreparable harm—there are any number of other companies to whom FSS could  
22 turn for payment processing services. And FSS' legal claims are unprecedented and unfounded.  
23 If countenanced, FSS' claims would force PayPal to continue to do business with a company  
24 whose mission and message are contrary to its own, notwithstanding PayPal's clear contractual  
25 right to end the parties' relationship. For these reasons, PayPal respectfully requests that the  
26 Court deny FSS' Motion for a Temporary Restraining Order and Preliminary Injunction in its

27 <sup>11</sup> See [https://www.infowars.com/shock-audio-listen-to-the-phone-call-where-paypal-banned-](https://www.infowars.com/shock-audio-listen-to-the-phone-call-where-paypal-banned-infowars/)  
28 [infowars/](https://www.infowars.com/shock-audio-listen-to-the-phone-call-where-paypal-banned-infowars/).

1 entirety.

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3  
4  
5 Dated: October 4, 2018

Respectfully submitted,

KEKER, VAN NEST & PETERS LLP

6  
7 By: /s/ Khari J. Tillery

MATTHEW M. WERDEGAR

8 KHARI J. TILLERY

9 BALLARD SPAHR LLP

10 DAVID J. BODNEY (pro hac vice to be  
filed)

11 MARK S. KOKANOVICH (SBN 230286)

SCOTT S. HUMPHREYS (SBN 298021)

12 Attorneys for Defendant

13 PAYPAL, INC.